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CITATION

872-764—69——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 76

ELLIOT ASHTON WELSH, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 55–81) is reported at 404 F.2d 1078.

JURISDICTION

The judgment of the court of appeals (A. 82) was entered on September 23, 1968. A petition for rehearing was denied on January 31, 1969. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 1, 1969, and the petition was filed on that date. The petition for a writ of certiorari was granted on October 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conscientious objection to war in any form stemmed from religious beliefs.

2. Whether the Selective Service laws may constitutionally be applied to require induction into the Armed Forces of a registrant who declares his opposition to military service on nonreligious grounds.

3. Whether a registrant who refuses to reexecute an Armed Forces Security Questionnaire at the induction station can properly be charged with refusing to submit to induction.

STATEMENT

After a jury-waived trial in the United States District court for the Central District of California, petitioner was found guilty of refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462(a). On June 1, 1966, he was sentenced to imprisonment for three years. On appeal, the conviction was affirmed (A. 55–69), one judge dissenting (A. 69–81).

The evidence showed that on February 2, 1960, petitioner registered with Local Board No. 95, in Los Angeles County, California (SSF 1).[1] In December 1961, he was classified 1–A, a classification he acknowledged when he applied for and received permission to depart from the United States for a one-year period. On March 27, 1964, he was ordered to report for a physical examination (SSF 8). In April 1964, he requested exemption from combatant training and service on the

[1] "SSF" refers to petitioner's Selective Service File which was introduced into evidence at trial as Government Exhibit 1.

special form for conscientious objectors (SSS Form 150), stating that because of his beliefs "he was conscientiously opposed to war in any form," but striking out the language on the form relating to "religious training" (SSF 17). He also indicated that he did not believe in a Supreme Being (*ibid.*). On May 12, 1964, the local board granted the requested exemption and classified petitioner I–A–O (SSF 11, 16–17).[2]

On May 25, 1964, petitioner wrote a letter stating that he wished to appeal the classification and asking for a personal appearance before the local board. For the first time he expressed opposition not only to combatant service but to non-combatant service as well, saying that any participation in the Armed Forces would implicitly condone and contribute to the mission of the military (A. 13). After his appearance, the local board advised him that since he had appealed his classification, the appeal board would determine whether he qualified for a non-combatant, I–O classification (A. 14). He thereafter again appealed his classification (A. 15). In July 1964, the appeal board tentatively determined that petitioner should not be classified I–O or in a lower class (A. 18).

On June 22, 1965, petitioner wrote his local board, stating that it had come to his attention that "Supreme Being" might have a broader interpretation than the one he had given it in completing the form 150. In explaining his views and relating them to his conscience, petitioner stated that "in our failure to

[2] On May 8, 1964, petitioner was found fully acceptable for induction into the Armed Forces.

recognize the political, social, and economic realities of the world, we *as a nation*, fail our responsibility *as a nation*" (A. 30).

In July 1965, petitioner personally appeared before a Department of Justice hearing officer who found that there was "no religious basis" for petitioner's conscientious objector claim. The hearing officer concluded, therefore, that petitioner's objection to military service did not come within the statutory exemption. In August 1965, the Department of Justice accepted this recommendation and so advised the appeal board (App. 19–24).[3] Subsequently, on October 13, 1965, petitioner wrote to the appeal board, asking to "comment upon and correct" certain statements in the Department of Justice recommendation (A. 38).

On November 15, 1965, petitioner was classified I–A by the appeal board and his file was returned to the local board (SSF 68). One week later, he was ordered to report for induction. On November 30, 1965, his employer requested a postponement of his induction, stating that petitioner's specific assignment as a mathematician and scientific computer programmer "involves the entire responsibility for the scientific programming of a computer which is utilized as a turbojet engine analyser for several military aircraft which are being utilized in Viet-Nam at this time" (A. 46). After this request was denied, petitioner

[3] This hearing took place subsequent to this Court's decision in *United States* v. *Seeger*, 380 U.S. 163. In fact, the Department's recommendation made specific reference to the *Seeger* opinion.

reported to the induction center on December 8, 1965, but refused to step forward for induction. The instant prosecution ensued.

On appeal the court below noted that petitioner "constantly declared that his beliefs stemmed from sociological, economic, historical and philosophical considerations," and "denied that his objection to war was premised on religious belief" (A. 59). It thus rejected his contention that the appeal board's denial of I–O and I–A–O classifications was without any basis in fact. Moreover, the court concluded that all of petitioner's procedural rights had been accorded him. It found that petitioner's refusal to reexecute an Armed Forces Security Questionnaire at the induction station provided no basis for vitiating his conviction, resulting at most in a non-prejudicial procedural irregularity. In a footnote at the end of its opinion, the court referred to the fact that the dissenting opinion,[4]

[4] The dissenting opinion found error in the appeal board's accepting without apparent question the Department of Justice hearing officer's conclusion that there was "no religious basis for the registrant's conscientious objector claim" (A. 69). After reviewing the evidence presented to the appeal board, the dissenting judge concluded that there was no basis in fact for its determination that petitioner's objection to military service was not of a religious nature in the statutory sense, in view of this Court's broad reading of Section 6(j) in the *Seeger* case (A. 74–81). Petitioner's "disclaimer of a religious motivation [for his asserted objection] was predicated upon a misunderstanding of the statutory meaning of the term, as construed in *Seeger*," the dissent suggested (A. 79). His claim for conscientious objector status was thus improperly rejected, the dissent concluded, and his conviction should be reversed (A. 81).

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"while based on other grounds, mentions the possible unconstitutionality of the 'religious training and belief' provision of section 6(j) of the Act" (A. 69). As to this issue, the court simply stated that "since it was not listed as one of the questions presented in [petitioner's] opening brief or argued there it does not require comment in the majority opinion" (*ibid.*). It went on to state, however, that a collateral proceeding asserting this point "would find no support in this record and would be met by prior holdings of this court sustaining the religious exemption against Establishment Clause attack," citing various Ninth Circuit decisions as to which this Court denied certiorari (*ibid.*). Accordingly, the court below affirmed petitioner's conviction.

SUMMARY OF ARGUMENT

Section 6(j) of the Universal Military Training and Service Act, as enacted in 1948, provided an exemption from combatant training and service for persons who by reason of religious training and belief are opposed to participation in war in any form. The Act defined "religious training and belief" as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation", but expressly provided that the phrase "does not include essentially political, sociological, or philosophical views or a merely personal moral code."

In *United States* v. *Seeger*, 380 U.S. 163, this Court broadly construed the "Supreme Being" clause to avoid imparting to Congress an intent to pick and choose among religions. However, unlike the petitioners in *Seeger*, the petitioner in the instant case has constantly professed that his beliefs stemmed from sociological, economic and historical considerations rather than from religious belief. Under the circumstances, not only does the record show an ample basis in fact for the administrative determination that petitioner's beliefs were not religiously founded, but the record is devoid of evidence that would support the conclusion that his beliefs were essentially religious.

Assuming the Court agrees with our position that petitioner is a non-religious objector, the questions left for consideration are: (1) whether the granting of exemption to religious objectors but not to those whose beliefs are essentially based on the other considerations enumerated in the statute, amounts to an "establishment of religion" in contravention of the First Amendment or (2) whether the distinction amounts to an improper discrimination in violation of the Fifth Amendment.

Our basic position is that to accommodate religion is not to prefer it. The exemption for religious objectors is not an attempt to foster or encourage religion. Congress recognizes that to force certain persons to

fight would force them to violate the cardinal tenets of their religion and has sought to alleviate that hardship. To do so is to give a proper deference to the Free Exercise Clause, not to establish religion.

Moreover, Congress did not act arbitrarily or invidiously in distinguishing between religious objectors and those whose beliefs are not religious, but essentially political, sociological, philosophical or based on a purely personal moral code. An individual who disavows all religious belief (however broadly "religious" be defined) but who surveys the contemporary human scene and decides on the basis of political, sociological, and economic considerations that a particular war is wrong or that all wars are wrong is making a judgment in the field of human relations; he is essentially basing his judgment on the same considerations the government must consider in making its determination as to whether or not we should engage in war. This qualitative difference between religious and nonreligious objectors is one which Congress could validly recognize when passing legislation to implement its power to raise and support armies.

ARGUMENT

I. PETITIONER'S BELIEFS DO NOT QUALIFY AS RELIGIOUS WITHIN THE MEANING OF *United States* v. *Seeger*, 380 U.S. 163

Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)), as it read at the time petitioner first sought conscientious objector status in 1964, exempted from combatant service and training any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." It defined "religious training and belief" as:

> belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[5]

Such persons remain subject to the draft but are assigned to non-combatant service, or, if their religious beliefs require, to forms of civilian service outside the Armed Forces.

In *United States* v. *Seeger*, 380 U.S. 163, this Court concluded "that Congress, in using the expression 'Supreme Being' rather than the designation 'God' was merely clarifying the meaning of religious train-

[5] An amendment to the Act in 1967, subsequent to this Court's decision in the *Seeger* case, deleted any reference to a "Supreme Being" in Section 6(j). While the new provision does not purport to define "religious training and belief," it does continue to provide that the term "does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

ing and belief so as to embrace *all* religions" (*id.* at 165; emphasis added). Noting the "vast panoply of beliefs" prevalent in our country, the Court construed congressional intent as in "keeping with its long-established policy of not picking and choosing among religious beliefs" (*id.* at 175). To qualify as religious under the Court's construction, the person seeking exemption must possess either a religiously grounded belief or "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption" (*id.* at 176).

Finding that all three registrants in the cases before it qualified for the statutory exemption, as so interpreted, the Court deemed it unnecessary to decide whether Congress could constitutionally exempt persons whose beliefs stemmed from religious convictions while denying conscientious objector status to those whose objection to war—however strong and sincere—was grounded on a personal, philosophical or moral basis.

Petitioner, although he does not raise the issue as a question presented, suggests that, as the dissenting judge below thought (see A. 74–81), he also qualifies as a religious objector under the *Seeger* test. That question is a threshold one that must be resolved before this Court reaches the constitutional issues petitioner presents.

In our view the record shows that petitioner's beliefs are not based on religious training and belief even under the most expansive and generous reading

of Section 6(j), as authoritatively construed in *Seeger*. On his original application for conscientious objector classification, petitioner struck the words "my religious training and" from the statement as to the source of his conscientious objection (SSF 17). He further declared that he did not believe in a "Supreme Being" (*ibid.*). Accordingly, the application read that petitioner was "by reason of * * * belief, conscientiously opposed to war in any form." Subsequently, petitioner sent his local board a letter in which he amended his original claim for conscientious objector classification. He stated that it had come to his attention "that the term 'Supreme Being' may have a broader meaning than the one I had given it" (A. 29). Although he professed that he did "not believe in God—in the everyday sense," he indicated a desire to have the answer to the question, "Do you believe in a Supreme Being?", left open, at least for the time being (*ibid.*).

In presenting the reasons which provided the basis of his conscientious objector claim, petitioner stated his belief that each of us possesses "some sort of ethical apparatus, a conscience, if you will" (A. 30), and quoted with approval statements from a variety of sources which presumably explicated his views further. However, in his own words he stated (A. 33):

> Were I not granted relief under [the Act] I would be required to enter the service of the Government of the United States, which service involves not only the performance of duties which are onerous, but worse, the implied profession of commitment to the military ethic. I

> would not so much mind the cleaning of latrines per se; what I *would* object to is the fact that I am cleaning latrines in support of an institution which has become, quite simply, less than useful to the conduct of human affairs. I am afraid reason has already subverted my commitment to the military ethic.

Petitioner also referred to and criticized Lieutenant General Sir John Winthrop Hackett's statement in *The Profession of Arms* that "[t]he function of the profession of arms is the ordered application of force to the resolution of a social problem" (A. 33). Petitioner remarked:

> Doesn't he mean "elimination of the social problem"? If those who are causing a "social problem" are prevented from acting by means of force, the social problem is not resolved, really, it is either suspended or eliminated.

Petitioner concluded (A. 30–31):

> I have not been specific about my refusal to participate in the military *vis-á-vis* conscience. I do not believe it is possible to be. I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to "defend" our "way of life" profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation,* fail our responsibility *as a nation.* * * * It is suggested that those who implement policy are fully aware of these facts, but that they must be realistic. "When confronted by armed agres-

> sion," they ask, "how else can we respond?" My questions: What measures could we have taken to alleviate the "social problem" peacefully? To what degree are we economically and socially committed to "look for" aggression? To what extent do we thus *depend* on it?

In accordance with procedures in effect at that time, after a tentative determination by the appeal board that petitioner should not be classified I–O or in a lower class, petitioner's file was forwarded to the Department of Justice for the purpose of securing an advisory recommendation.[6] The Department's report noted that petitioner stated that he did not believe in God or a Supreme Being, but rather that he believed in the "natural law" (A. 21). As to natural law, the hearing officer reported that petitioner recognized that, just as there are certain physical laws in nature, such as gravity and electrical impulses, there are laws affecting the relationship of human beings such as the feeling of gregariousness; that ethics are implicit within us governing the conduct of individuals; that he refused to relate human conduct to questions of guilt, punishment or reward; and that he does not believe in a life after death or in a life of what might be called a human soul (*ibid.*). The hearing officer reported that petitioner stated that his primary objection to military service is that soldiers are involved in taking human lives and that life should not be voluntarily taken, but that he did not see it as a moral or religious wrong but merely as a

[6] This procedure was subsequently eliminated by the 1967 amendment to the Act.

"social error" or illogical action (*ibid.*).[7] The hearing officer reported that while petitioner conceded the possibility that some of his early religious training may have had some influence on his thinking, he stressed "that his belief is that his opinions have been formed by reading in the fields of history and sociology, and that they are purely 'rational' as opposed to religious" (A. 22).

On the basis of petitioner's own statements, the Department of Justice and the appeal board were amply justified in concluding that petitioner was not, and did not claim to be, a *religious* conscientious objector. We recognize that *Seeger* held that the lack of formal religious training does not preclude an applicant from qualifying for conscientious objector status under Section 6(j). But in *Seeger* this Court noted that "at no time did any one of the applicants suggest that his objection was based on a 'merely personal moral code' " (380 U.S. at 186), and that "at the outset each of them claimed in his application that his objection was based on a religious belief" (*ibid.*). In the instant case, on the other hand,

[7] Petitioner later wrote a letter to the appeal board "to comment upon and correct several statements" in the Department's report (A. 38). He stated that while "I mentioned taking of life as not being, for me, a religious wrong. * * * I assumed [the hearing officer] was using the term 'religious' in the conventional sense" and that he did believe the taking of life to be morally wrong (A. 44). Petitioner also sought to correct, *inter alia*, the hearing officer's statement that "the registrant stated that there should be no armies, even for defense or resistance to aggression" (A. 21), by asserting that the statement should read that "there should be no armies because they do not constitute a vital defense, nor do they provide a permanent means of resisting aggression" (A. 43).

petitioner did not claim that his beliefs were religious in origin. Rather, as noted above, he characterized his beliefs as having been formed "by reading in the fields of history and sociology" (A. 22).[8] In fact, the record is devoid of evidence which would reveal that petitioner's beliefs are based on other than essentially political, sociological or philosophical views or a merely personal moral code.

When an individual claims to be religious, his own characterization of his beliefs in this respect must be accorded great weight (*Seeger, supra*, 380 U.S. at 184; see also *United States* v. *Ballard*, 322 U.S. 78). Similarly, his own statement that his beliefs are *not* religious is not to be lightly disregarded. As the court of appeals observed and the record discloses, petitioner "constantly declared that his beliefs stemmed from sociological, economic, historical, and philosophic considerations," and "denied that his objection to war was premised on religious belief" (A. 59). Taking into account the responsibility of the Selective Service authorities in assaying the facts and the limited scope of judicial review in this area, we believe that there was ample basis in fact for the administrative determination that petitioner's beliefs were not religiously founded. See, *e.g.*, *Estep* v. *United States*, 327 U.S. 114. The record is not only empty of evidence that could lead to the conclusion that his beliefs could be construed as essentially religious, it affirmatively shows that they were of a non-religious

[8] In his subsequent letter to the appeal board (discussed in note 7, *supra*), petitioner did not deny this to be a correct statement of the source of his beliefs.

character, even under the broad meaning given that concept in the *Seeger* case. To extend the definition of religion further to include the beliefs of persons like petitioner would be to vitiate entirely that portion of the statute which specifically provides that "religious training and belief * * * does not include essentially political, sociological, or philosophical views, or a merely personal moral code," and thus reach a result plainly contrary to the manifested congressional intent.

II. CONGRESS MAY CONSTITUTIONALLY ACCOMMODATE THE FREE EXERCISE OF RELIGION WITH THE NEEDS OF NATIONAL DEFENSE BY ASSIGNING TO NON-COMBATANT SERVICE OR CIVILIAN WORK OUTSIDE THE ARMED FORCES REGISTRANTS WHO BY REASON OF RELIGIOUS BELIEF ARE OPPOSED TO PARTICIPATION IN WAR IN ANY FORM

In judging the constitutionality of the classification which Congress established by Section 6(j), it is essential to keep in full perspective the legislative problem of defining any exemption for conscientious objectors. The question here is not whether concern for the rights of the individual citizen, as opposed to society generally, should lead to a policy of exempting all persons who can be said to have conscientious scruples against military service, or whether a personal moral code is as "good" or as "worthy of respect" as religious convictions. The framing of a conscription law involves legislative judgments of no little difficulty, which the courts may not supersede unless the legislature clearly exceeds its proper function. The fact that other lawmaking bodies in certain other countries have determined to allow exemptions to conscientious objectors whether or not their beliefs

stem from religion (Pet. Br. 15–16) is hardly controlling in this regard. The question here is whether Congress constitutionally had the authority to make the choice it did to exempt only those whose conscientious objection stemmed from religious belief. This in turn resolves itself into two questions—whether the congressional determination on this matter constitutes the "establishment" of religion in violation of the First Amendment and whether it amounts to invidious discrimination under the Fifth Amendment.

The historical evolution of the conscientious objector provision was traced in detail in the government's brief in the *Seeger* case (No. 50, 1964 Term, pp. 41–69), and we do not repeat it here.[9] It shows however, that Congress has considered more than once, with full floor debate and committee testimony, what special treatment, if any, should be accorded persons otherwise eligible for the draft who oppose participation in war in any form. The legislative approach to this troublesome subject has been remarkably consistent. The exemption, with few exceptions, has been confined throughout to persons who belonged to religious sects opposed to war or to those whose individual religious beliefs provided the basis for that conviction. From the day James Madison suggested that "no person religiously scrupulous shall be compelled to bear arms" (1 *Annals of Congress* 749) through the enactment of amended Section 6(j), there was general agreement that such an accommodation of religious freedom with the needs of national defense neither created an un-

[9] The Argument portion of the *Seeger* brief has been reprinted and, for the convenience of the Court, is submitted as a Supplement to this brief.

constitutional discrimination nor violated the principle of separation between Church and State. While long existence cannot validate an unconstitutional practice, the fact that Section 6(j), as presently written, reflects a tradition that dates back to the early days of our republic, and even to colonial times, goes far to demonstrate the reasonableness of the legislative classification and its consistency with the Constitution.

1. In granting exemption only to religious conscientious objectors, Congress is accommodating, rather than establishing, religion.

The separation of church and state mandated by the Establishment Clause of the First Amendment does not, we submit, require government to ignore religious beliefs in framing legislation dealing, in a secular context, with matters where the result would otherwise be, at least in some instances, to force a person to violate the cardinal tenets of his religion. The aim of the exemption is to alleviate the hardship that would result if individuals were compelled to flout the commands of their religion in order to obey those of the State—or subject themselves to criminal prosecution for adhering to their religious beliefs.

To impose an obligation to participate in combatant training and service upon a person whose religious convictions forbid him to participate in war in any form interferes in a substantial sense with religious liberty. Congress has sought to reduce this interference rather than ask a registrant to violate the principles of his religion—whatever form that reli-

gion may take. Section 6(j) attempts to accommodate the principle of equality of patriotic obligation with religious liberty by assigning the religious objector to non-combatant service or, if that too be inconsistent with his religious scruples, by assigning him to civilian work in the national interest in lieu of military service. In so doing Congress does not interfere with, much less prohibit, the full freedom of non-religious objectors to refuse to believe in or practice religion. It has merely determined that they, like millions of others, do not receive an exemption available to religious objectors.

The question narrows, therefore, to whether Congress, by allowing an exemption for religious objectors, grants a preference for religion in violation of the purposes of the First Amendment. Cf. *Everson* v. *Board of Education,* 330 U.S. 1, 15–16. Our basic position is that accommodation of religion is not a preference for religion. For the State to avoid an intrusion upon freedom of religion is an effort to remain neutral—to avoid hostility to religion rather than to prefer it. The exemption granted to religious objectors is an attempt by Congress to accept or acquiesce in, to recognize, to accommodate rather than to establish, foster, or encourage religion.[10]

[10] In arguing, as we do, that Congress may properly seek to avoid such interference, we intend no implication that Congress is constitutionally required to grant any exemption at all. This Court has stated the contrary. See *United States* v. *Macintosh*, 283 U.S. 605, 623–624 (*dictum*), overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61. See also *Hamilton* v. *Regents*, 293 U.S. 245, 265–268 (Cardozo, J., concurring); our brief in *United States* v. *Sisson*, No. 305, this Term (pp. 42–49).

The power of Congress to make such an accommodation has been sustained on several occasions in prior decisions of this Court. In the *Selective Draft Law Cases,* 245 U.S. 366, the Court upheld the Selective Draft Law of 1917, which included an exemption for persons who were members of religious sects opposed to war in any form, so long as their own religious convictions were the same as those of the sect to which they belonged. In this regard, the Court stated (*id.* at 389–390):

> [W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act * * * because we think its unsoundness is too apparent to require us to do more.

Similarly, in *Ruthenberg* v. *United States,* 245 U.S. 480, decided shortly thereafter, the Court merely cited the *Selective Draft Law Cases* in holding the exemption constitutional as against the claims that it violated freedom of religion to allow an exemption to objectors who opposed war and belonged to a sect which opposed all war, but not to religious objectors who did not belong to such a sect, and, alternatively, to give an exception to objectors who based their position on religious conviction, but not to those whose views came from within themselves.[11] The issue in these early cases was presented in a more difficult context than here since the World War I statute re-

[11] See Brief for Petitioner, No. 656, 1917 Term, pp. 1–9.

stricted the exemption to members of religious sects and made no provision for the unaffiliated believer. In the subsequent amendments to the Act, as construed in *Seeger*, there is no longer the problem that would arise were the exemption intended to pick and choose among various religions (*Seeger, supra*, 380 U.S. at 175–176).

While the Court has not since had to deal with the constitutional issue with respect to the conscientious objector exemption, its more recent decisions in the First Amendment area recognize that it is permissible for Congress to make accommodations in order to minimize conflict between religious belief and governmental regulation.

In *Everson* v. *Board of Education*, 330 U.S. 1, where the Court upheld the propriety of the payment of bus fares to children attending parochial as well as public school, it said (*id.* at 18):

> Of course, cutting off church schools from [various municipal services such as police and fire protection], so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Subsequently, in *Zorach* v. *Clauson*, 343 U.S. 306, the Court sustained a public school program releasing children to attend religious instruction in their own

places of worship.[12] There the Court said (id. at 313–314):

> We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. * * * When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. * * * The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. * * *

The Court nowhere suggested that non-religious parents also must be permitted to have their children released for an equivalent period; indeed, the released-time program before the Court clearly did not allow for this. See 343 U.S. at 308–309, n. 1. Thus, the Court upheld an accommodation of religion even though no equivalent exemption from attendance was extended to non-religious persons.

In the Sunday Closing Law cases (*McGowan* v. *Maryland*, 366 U.S. 420; *Two Guys From Harrison-*

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[12] Compare, however, *McCollum* v. *Board of Education*, 333 U.S. 203, holding a program of religious instruction conducted within the public schools unconstitutional.

Allentown, Inc. v. *McGinley,* 366 U.S. 582; *Braunfeld* v. *Brown,* 366 U.S. 599; and *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617), this Court upheld the statutes involved on the ground that they had a secular, not a religious, purpose. However, none of the opinions in those cases suggested that, if an exemption were granted to Sabbatarians, such as Orthodox Jews—as 21 of the 34 States which had Sunday closing laws in fact did (see 366 U.S. at 614, n. 1)—it would be unconstitutional under the Establishment Clause. Quite the contrary, the Court in *Braunfeld* indicated that "this may well be the wise solution to the problem" (366 U.S. at 608).[13]

Finally in *Sherbert* v. *Verner,* 374 U.S. 398, this Court held that a State may not deny unemployment compensation benefits to persons who will not work on Saturdays because of their religious beliefs, where the individual involved had refused employment which required such work. This holding was based on the Free Exercise clause of the First Amendment and therefore did not apply to persons of religious faiths who were not forbidden to work on Saturdays or to the non-religious. The Court explicitly rejected the argument that this holding itself constituted an establishment of religion on the ground that it "reflects

[13] Mr. Justice Brennan, in his concurring and dissenting opinion in *Braunfeld*, concluded that the Free Exercise Clause prevented Orthodox Jews from being required to close their businesses on Sunday since their religion prescribed that they be closed on Saturday and closing for two days each week would cause them serious economic injury. In so doing he rejected the claim that such an exemption from the Sunday laws for persons of certain religious sects would constitute an establishment of those religions (366 U.S. at 615).

nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall" (374 U.S. at 409). Mr. Justice Stewart, concurring in the result, agreed that the State was required by the Free Exercise Clause to treat a person differently when his refusal to work is based on religious convictions than when it is grounded on other reasons and that this did not violate the Establishment Clause (374 U.S. at 413–417). Mr. Justice Harlan, joined by Mr. Justice White, dissented on the ground that the Free Exercise Clause did not require the State to make an exception for persons who refused to work because of religious conviction. His opinion went on, however, to say (374 U.S. at 422–423):

> [I]t would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of "neutrality" * * * is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. * * * [T]here is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

Thus, the Court was unanimously of the view that, whether or not in a particular situation government is constitutionally required to do so, it *may* give an exemption limited to persons holding religious beliefs in order to avoid interference with their freedom of religion, as fully protected by the First Amendment. Cf. also *Murdock* v. *Pennsylvania,* 319 U.S. 105.

This line of cases recognizing the constitutional permissibility of accommodating religious belief and governmental regulation is readily distinguishable from *Torcaso* v. *Watkins,* 367 U.S. 488. In *Torcaso,* the State requirement of a religious oath as a prerequisite to holding public office was struck down as inconsistent with the Free Exercise Clause. There the State-required oath, which exacted affirmation of a belief in God, did not purport to be—nor could it reasonably be argued to be—designed to accommodate religion. Nor was it a proper area in which religion should be allowed to operate. It is a far different situation where the State seeks to accommodate one whose religion mandates that he not participate in war. For the State not to recognize, respect, and accommodate this person's convictions would, whether justifiable or not, interfere significantly with his freedom to follow his religious beliefs. It would put the government in a position of hostility, rather than simply of neutrality, toward religion.

Nor do this Court's more recent decisions in Establishment Clause cases militate against the accommodation here suggested. In *Engel* v. *Vitale,* 370 U.S. 421, the Court concluded that "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no

part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government" (*id.* at 425). Granting exemption to religious objectors to participation in war in no respect constitutes the kind of governmental "religious program" which the Court in *Engel* found unconstitutional. Similarly, in *Abington School District* v. *Schempp*, 374 U.S. 203, where the Court struck down Bible reading and saying of the Lord's Prayer as religious exercises in public schools, the standard enunciated is wholly compatible with legislative recognition of religiously grounded objection to military service. A recurrent theme throughout the *Schempp* opinion, which includes as thorough a doctrinal discussion of the First Amendment as any of the Court's recent cases, is the necessary and unavoidable interplay between the Free Exercise and Establishment Clauses. And the term most frequently used in that opinion, in describing the proper relationship between church and state, religion and government, is "neutrality". If government oversteps the bounds in favoring religion, it violates the Establishment Clause; but just as surely if it disfavors religion it runs afoul of the Free Exercise Clause. What is called for by *Schempp* is a reasonable accommodation along the lines here suggested.[14] The critical test is there stated

[14] As Mr. Justice Brennan stated in his concurring opinion in *Schempp*, 374 U.S. at 295, "]N[othing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs. Surely the Framers

in the following language: "[W]hat are the *purpose* and the *primary effect* of the enactment?" (374 U.S. at 222; emphasis added). Applying this standard to Section 6(j), it seems clear that the purpose, as well as the primary effect, of allowing exemption to religious objectors is not to advance or foster religion, but instead simply to avoid inhibiting religion. The purpose is thus a secular one, within the meaning of the Court's opinion in *Schempp,* and the result achieved is neither favoritism nor restraint, but rather neutrality (see *ibid.*). Indeed, as the extensive discussion in Mr. Justice Brennan's concurring opinion in *Schempp* indicates, such an approach of reasonable accommodation is the sole way to work out the potentially self-defeating clash which might appear to exist between the Free Exercise and Establishment Clauses (see *id.* at 230–304). As specifically pointed out in that opinion, while government may not be required by the First Amendment to exempt religious conscientious objectors from military service, "hostility, not neutrality, would characterize * * * the withholding of draft exemptions for ministers and conscientious objectors" (*id.* at 299).

Finally, the Court's decision in *Board of Education* v. *Allen,* 392 U.S. 236, which upheld the validity of New York's program of lending textbooks free of charge to children in parochial as well as public

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would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose." See also Mr. Justice Goldberg's concurring opinion in *Schempp* (374 U.S. at 306).

schools, confirms the view that an establishment of religion in the constitutional sense does not occur simply because government takes religion into account in developing a particular program. Analogizing the situation there presented to that in *Everson*, the Court concluded that application of the test enunciated in *Schempp* did not require invalidation of the program as violative of the Establishment Clause (see *id.* at 243). See also *Pierce* v. *Society of Sisters*, 268 U.S. 510, and *Cochran* v. *Board of Education*, 281 U.S. 370, on which the Court in *Allen* relied to some extent.

As shown above, the pertinent decisions of this Court establish that the State and federal governments are allowed considerable discretion and leeway consistent with the Establishment Clause, in accommodating religion. Indeed, in *Sherbert* v. *Verner*, *supra*, this Court held that a State was *compelled* by the Free Exercise Clause to provide an exemption for persons of particular religious views even though no exemption was necessary for anyone else. Surely Congress has equal power to decide to accommodate persons whose religious convictions forbid their participation in war in any form. To do so is not to establish religion, in the historical or contemporary sense.

2. Congress, moreover, can reasonably discriminate between religious and non-religious conscientious objectors, without violating the "equal protection" notion implicit in the Fifth Amendment. See, *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497, 499. This remaining question, otherwise stated, is whether Congress acted arbitrarily or capriciously or engaged in invidious

discrimination in granting exemption to religious objectors, but not to those whose beliefs are not religious but essentially political, sociological, philosophical or based on a purely personal moral code. In our view, the judgment that only religious objectors should be exempt is one which Congress could legitimately make.

The heart of the legislative problem in exempting conscientious objectors, has always been to draw a fair line defining the limits of the exemption. Considering the continuum of beliefs ranging from the revealed commands of a fundamentalist God through modern Protestant, Catholic, Jewish, and other theology to moral philosophy, and ultimately to political judgments based upon the factors that must be weighed by the President and Congress in declaring war, raising armies, and appropriating money for the national defense, that task can be an exceptionally difficult one. Historically, the impetus behind the exemption for conscientious objectors came principally from the unwillingness of Congress to punish as a criminal one who refused to perform military service in obedience to what he believes is the command of a God transmitted by divine revelation. The unwillingness of the American people to compel an individual to disobey a divine command and yield to a human obligation imposed by government is older than the republic. The Court in *Seeger* recognized, however, that, in the modern world, the concept of religious believers cannot be narrowly confined to members of

recognized sects.[15] It was acknowledged there, moreover, that "religion" in the broad, constitutional sense, embraces a wide variety of views, some of which would not seem "religious" to persons adhering to essentially traditional concepts. As the Court there said (380 U.S. at 174):

> Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution.

Nevertheless, however difficult it may sometimes be to draw the line, there is a qualitative difference be-

[15] It might be maintained that limiting the scope of the conscientious objector exemption to those whose claims are religiously grounded is justifiable because a manageable, tangible standard susceptible of administrative and judicial application is thereby provided. Unless, however, the exemption were restricted to members of established sects of pacifists, it is doubtful that this purpose would always be effectively served. Even before *Seeger* and the resulting 1967 amendments to the act, the exemption was not so narrowly defined. And were it so limited, it is questionable whether it could sustain constitutional scrutiny. Nonetheless, the fact remains that the task of determining whether a particular individual's opposition to war is sincerely and fundamentally held is at best a difficult one. That task becomes immeasurably more complicated if those administering the system are called upon to determine whether one seeking an exemption genuinely holds to a moral or ethical creed or a personal code that is opposed to war. See Smith and Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19 U. of Pitt. L. Rev. 695 (1958). Indeed, experience with the exemption as presently established amply attests to both its workability and its reasonableness (see *id.* at 702). See also Comment, 34 U. of Chi. L. Rev. 79, 104–105 (1966).

tween religion and the inner voice, on the one hand, and intellectual analysis and decision, on the other. An individual who disavows all religious beliefs (however broadly "religion" be defined), but who surveys the contemporary human scene and decides on the basis of political, sociological, and economic considerations that a particular war is wrong, or that all wars are wrong, is making a judgment in the field of human and social relations. However firm the conviction and unalterable the determination not to support the believed wrong, it is then a human judgment based upon the same factors as the government must consider in reaching its decision. It is not yielding to a higher power, however that power may be conceived or defined. A non-religious judgment is thus essentially a practical, analytic, or political judgment, no matter how sincerely or conscientiously held. This Court in *Seeger*, while recognizing the wide spectrum of religious beliefs currently extant, specifically noted, with apparent approval, that "[t]he section [6(j)] excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it" (380 U.S. at 173).

This qualitative difference between religious and non-religious objection to war is one which Congress could reasonably recognize in deciding whom to subject to involuntary military service. The Constitution does not set up freedom of conscience, it does not equate conscience with religion. Nor was Congress bound to do so. Congress could reasonably draw the line as to who shall and who shall not be compelled

to serve by taking into account, as the Constitution does, the right to exercise one's religion freely. It may be that valid reasons could be offered for drawing the line at some other point. But such argumentation should be made to Congress, not the courts. This was an appropriate place for legislative judgment; and the only issue here is whether Congress had the constitutional power to recognize religious objection to war in any form as a basis for exemption from military service (although requiring non-combatant or civilian service of the one so exempted), while declining to grant an equivalent exemption to a non-religious sincere objection. That is, in our view, a judgment which our Constitution empowers the legislature to make. It is implicit in the power expressly granted to raise and maintain armies.

Thus, we submit, no constitutional infirmity has been shown to inhere in the scheme prescribed by Section 6(j). The classification involved is not irrational, and there is no invidious discrimination against non-religious objectors. Certainly Congress has not acted arbitrarily when it concludes that there is a significant distinction between an individual whose religious beliefs command him not to kill because of the authority of what he regards as a higher power no matter how vaguely he defines it, and a person who, while believing it wrong to kill, essentially relates this to social, economic, and political considerations. That is the line Congress has sought to draw; the power of Congress to do so should be accepted by this Court. The question is not how this Court would resolve the problem, but whether Congress has gone beyond the limits of its

powers in reaching the accommodation it has prescribed.

Indeed, it has been repeatedly recognized that the task of reconciling the constitutional commands of the Establishment and Free Exercise Clauses is not exclusively a matter of judicial concern. Historically the legislative branch has played an important role in the numerous determinations of policy which relate to Church-State matters. Solution of these often delicate relationships has come as a result of the judiciary's affording the legislature a significant measure of discretion, even in those situations where any of the legislative alternatives will inevitably result in questions under either the Free Exercise or Establishment Clause. In circumstances where the tension between these provisions is heightened, the preferable course for the courts to follow is to extend even greater rein to the legislature, for the alternative is to substitute judicial attitudes for those of the elected representatives of the people on matters where the constitutional lines are not clear and where the considered view of the representatives of the people is entitled to great weight. Though one effect of statutes such as Section 6(j) may be to facilitate the practice of religion, the sound constitutional approach in construing the Establishment Clause in such circumstances is one of reasonable accommodation, not wooden application. That is the approach we urge here.

III. A REGISTRANT'S REFUSAL TO RE-EXECUTE AN ARMED FORCES SECURITY QUESTIONNAIRE DOES NOT WITHOUT A SHOWING OF POSSIBLE PREJUDICE PROVIDE A DEFENSE TO A PROSECUTION FOR FAILURE TO SUBMIT TO INDUCTION

On April 30, 1964, petitioner took a physical examination and was found fully acceptable for induction into the Armed Forces (SSF 25). At that time, he executed an Armed Forces Security Questionnaire (A. 47–50). However, when he reported to the induction station on December 8, 1965,[16] he refused to re-execute such a questionnaire (*ibid.*). He maintains (Pet. Br. 23–29) that since Army regulations provide that no person who has not completed such a questionnaire is subject to induction, at least immediately, he could not properly be convicted of refusing to submit to induction. That argument is without substance, and warrants only brief discussion.

It is a well established rule that "procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Knox* v. *United States*, 200 F. 2d 398, 401 (C.A. 9); *Edwards* v. *United States*, 395 F. 2d 453 (C.A. 9), certiorari denied, 393 U.S. 845. We submit that this rule is particularly applicable in this case, as the court below properly concluded (A. 65–67).

Nowhere has petitioner suggested any information which would point to the conclusion that he would be a security risk. In fact, the FBI investigation conducted pursuant to his claim for conscientious objector status did not reveal any information that

[16] This is the date on which petitioner refused to submit to induction.

would even suggest that petitioner would be rejected for security reasons. In view of these circumstances, we think that the court of appeals correctly held that "rejection by the Army for security reasons, like rejection for felony conviction, is wholly for the benefit of the Army and may be waived" (A. 67). See *Nickerson* v. *United States*, 391 F. 3d 760, 762–763 (C.A. 10), certiorari denied, 392 U.S. 907; *Korte* v. *United States*, 260 F. 2d 633, 637 (C.A. 9), certiorari denied, 358 U.S. 928. To accept petitioner's argument, is to allow any inductee who has concluded that he has no intention of permitting himself to be inducted to postpone his induction, possibly for months, while forcing the military to waste its intelligence resources in conducting a useless investigation. This, of course, conflicts with the important and overriding objective of the Selective Service System—"to raise an army speedily and efficiently." *Falbo* v. *United States*, 320 U.S. 549, 553.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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